STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY, SS SUPERIOR COURT

Pike Industries, Inc.

V.

Town of Farmington

Docket No. 00-E-0007

ORDER

The plaintiff files this appeal claiming the Town of Farmington unconstitutionally imposed a land use change tax on the value of "earth" as if it were real estate contrary to Part 1, Article 28 of the New Hampshire Constitution and RSA 72-B. As a result, it seeks an order from this court setting aside the $35,000 Land Use Change Tax levied on the plaintiff's property. The defendant objects claiming the abatement request was untimely. For the reasons stated in this order, the decision of the Town of Farmington is affirmed.

The court first addresses the Town's argument that the abatement request was untimely. Any person seeking an abatement of a land use change tax must apply in writing to the selectmen within 60 days of the notice of tax date. RSA 79-A:10, I. In this case, the Town issued a notice of tax on May 27, 1999. Since the plaintiff did not file for an abatement until August 18, 1999, nearly one month after the deadline stated in RSA 79-A:10, I, the

Town argues it properly denied the abatement request. The court agrees.

The plaintiff argues that since the Town acted unconstitutionally when it assessed the land use change tax on "earth" in addition to real estate, it need not comply with the deadline contained in RSA 79-A.[1] In support, the plaintiff relies on J.E.D. Associates, Inc. v. Town of Atkinson, 121 N.H 581 (1981). Where, as here, the plaintiff argues the Town inappropriately applied RSA 72-B:1, I, to mineral rights, the holding in J.E.D. Associates is inapplicable.

The plaintiff in J.E.D. Associates challenged the constitutionality of a regulation requiring it to deed to the town seven and one-half percent of the total acreage of a proposed subdivision as a condition of approval. Throughout the approval process, the plaintiff challenged the constitutionality of the regulation arguing that it constituted extortion. After deeding the required acreage to the Town, the plaintiff sued the Town seeking to invalidate the regulation. The trial court dismissed the case finding that the plaintiff had failed to properly appeal the board's ruling. In reversing the trial court, the Supreme court stated:

[1] RSA 72-B:1, I provides that earth and excavation (mineral rights) shall be exempt from taxation as real property, however, such rights shall be subject to a separate excavation tax once removal of the earth begins. Consequently, when the Town levies a land use change tax, it may do so with respect to real estate only and not "earth" and excavation.

> Although the plaintiff did not follow the statutory route of appeal . . . this does not bar our consideration of its claims. The claim that regulation H is invalid is a constitutional one. . . . It is not a claim that falls within the jurisdiction of the planning board but is a purely legal one that need not be pursued by way of appeal. . . . (Emphasis added.)

J.E.D. Associates, 121 N.H. at 583. Thus, the Supreme Court considered the constitutionality of regulation H.

In contrast, the plaintiff here does not challenge the constitutionality of a specific regulation or practice but rather claims the tax as assessed was improperly applied to mineral rights. Indeed, the application for abatement states, "Current use penalty assessed on entire purchase price of $350,000.00. Purchase price included $220,000.00 of mineral rights which are not taxable as real property under RSA 72-B:1, I. Therefore, penalty should have been assessed on value of real estate only - $130,000.00." Nowhere in its abatement application does the plaintiff make a constitutional claim.

In addition, the planning board in J.E.D. Associates had no jurisdiction to determine the constitutionality of regulation H. Thus, requiring the plaintiff to follow the statutory route of appeal could not have resulted in a resolution of the plaintiff's claim. In this case, however, the Town clearly had jurisdiction to determine under which statute it could assess property taxes.

Had the plaintiff followed the proper statutory appeal process, the Town could have exercised its jurisdiction to determine that assessment of a land use change tax does not apply to "earth." It did not do so. Therefore, the claim for abatement is time barred.

Though framed as a constitutional challenge, the plaintiff in this case actually argues that the Town mistakenly applied a constitutionally valid taxation statute. It does not argue, as was the case in J.E.D. Associates, that the Town devised an unconstitutional scheme of taxation outside the scope of its authority. That the resulting tax may implicate a constitutional provision in hindsight and with creative analysis, does not convert the abatement request into a challenge of constitutional proportion.

Finally, the plaintiff argues that the assessment constitutes a taking under the New Hampshire Constitution and, as such, prevents the court from applying the deadline contained in RSA 79-A:10, I to the facts of this case. To constitute a taking, however, arbitrary or unreasonable governmental action must substantially deprive an owner of the viable use of his land or fixtures to land, not money. See Smith v. Town of Wolfeboro, 136 N.H. 337 (1992), State v. Manchester and Lawrence Railroad, 69 N.H. 35 (1896). See also 71 Am Jur 2d, State and Local Taxation, sec. 70. Accordingly, the court rejects the plaintiff's argument that the assessment constituted a taking.

Though the court believes there is some merit to the

plaintiff's underlying argument that the tax assessed was to high, it cannot reach the issue since the abatement request was not timely filed. See Appeal of Estate of Richard Van Lunen, ___ N.H. ___, slip op. at 4 (April 12, 2000).

Accordingly, the Town's decision is affirmed.

SO ORDERED.

Date: October 25, 2000

Tina L. Nadeau
Presiding Justice